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No. 86-1108

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

STATE OF VERMONT,
Petitioner,

v.

RICK COX,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Vermont

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RESPONDENT'S BRIEF IN OPPOSITION

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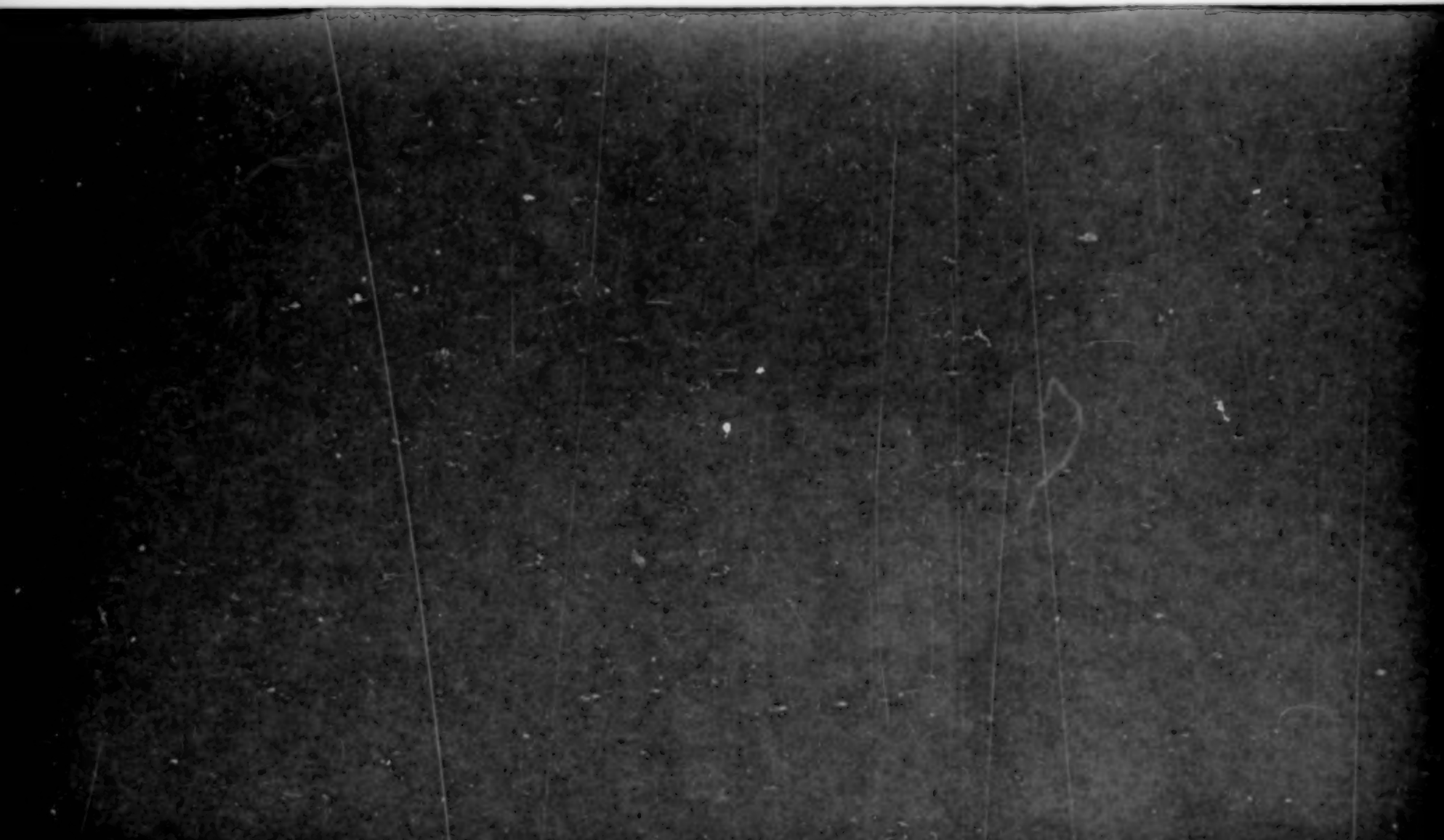

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Rick Cox, by counsel, respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the decision of the Vermont Supreme Court in this case.

REASONS WHY THE WRIT SHOULD BE DENIED

SUMMARY OF ARGUMENT

The Vermont Supreme Court held only that respondent retained and asserted his Fifth Amendment privilege after his nolo contendere pleas. This holding is in accord

with applicable federal precedent. The court below did not hold that *Miranda* warnings were required before a presentence interview by a probation officer, and thus this question is not presented in this case. The petitioner's objections to the factual conclusions of the court below concerning the voluntariness of respondent's statements are not proper matters for review in this Court.

ARGUMENT

I. A convicted but unsentenced defendant retains Fifth Amendment rights with regard to unrelated criminal activities or other matters which may result in enhancement of his or her sentence or future prosecutions.

The federal privilege against self-incrimination is not extinguished concerning all matters and for all purposes when a defendant pleads nolo contendere or guilty to an offense. A defendant retains his Fifth Amendment privilege to remain silent to prevent enhancement of his sentence or possible prosecution for other crimes. *United States v. Wilson*, 598 F.Supp. 138, 142 (E.D. Pa. 1984); *United States v. Miller*, 771 F.2d 1219, 1235 (9th Cir. 1985); *United States v. Trejo-Zambrano*, 582 F.2d 460, 464 (9th Cir.), *cert. denied*, 439 U.S. 1005 (1978). It is also clear that a state may not compel a convicted defendant to forgo his Fifth Amendment privilege, at least in the absence of some binding assurance of immunity from use in a future prosecution. See *Burch v. State*, 450 N.E. 2d 528, 530 (Ind. 1983); *Minnesota v. Murphy*, 465 U.S. 420, 429 (1984).

This case involves a defendant who asserted his privilege against self-incrimination and was then misled by a state agent into making damaging admissions that were used in sentencing him. Vermont has no case law or statute that prohibits the use of a defendant's statements to a probation officer made during a presentence investigation interview in later prosecutions for other crimes. Compare *In re Wayne H.*, 156 Cal. Rptr. 344, 596 P.2d

1 (Cal. 1979). Thus, even were one to conclude that use immunity from future prosecution discharged the privilege and prevented its assertion by a convicted inmate at sentencing, this limited protection was not available to respondent. The decision of the Vermont Supreme Court that respondent retained a Fifth Amendment privilege after his nolo pleas and that he surrendered that privilege involuntarily is in accord with federal and state precedent. *Jones v. Cardwell*, 686 F.2d 754 (9th Cir. 1982); *Burch v. State, supra.*

II. Neither the decision below nor the record raises the question whether a probation officer must give *Miranda* warnings to an incarcerated, unsentenced defendant before a presentence investigation interview.

Petitioner refers in its Question Presented to respondent's "unwarned" statements. Pet. (i). And in its argument, petitioner contends that the Vermont Supreme Court's decision ". . . squarely conflicts with four state appellate decisions which considered the issue of whether *Miranda* warnings need be given prior to the PSI interview." Pet. 8. The petitioner also maintains that ". . . [t]he opinion below is in direct conflict with a Ninth Circuit case, *Baumann v. United States*, in which a panel of the 9th Cir. held that 'neither *Estelle* * itself, nor the general principles announced in *Miranda*, require that a convicted defendant be warned of his right to counsel and his right to remain silent prior to submitting to a routine, authorized presentence interview.'" Pet. 9.

However, the Vermont Supreme Court did not hold that respondent was entitled to *Miranda* warnings before his interview with the probation officer. The court below decided only that "the sentencing judge relied on statements in the PSI that were taken after [respondent]

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* *Estelle v. Smith*, 451 U.S. 454 (1981).

asserted his Fifth Amendment privilege against self-incrimination, and that he made the statements involuntarily." Pet. 2a. Therefore, this case does not present an appropriate vehicle for exploration of the question presented by the petitioner, however important that question may be.

III. The decision below is a correct application of law to the facts.

Respondent maintains that the Vermont Supreme Court's decision is correct in both law and fact. It is noteworthy that one of the cases cited by petitioner—*Burch v. State*, *supra*—as in conflict with the decision below was actually relied upon by the Vermont Supreme Court in support of its decision. *Burch* and other cases cited by petitioner support the proposition that a convicted defendant has a right to remain silent when interviewed by a probation officer and that this right may not be impaired by coercive or misleading tactics. *Burch v. State*, *supra*, at 530; *People v. Williams*, 454 N.E. 2d 220, 242 (Ill. 1983); *Baumann v. United States*, 692 F.2d 565, 577 (9th Cir. 1982); *Estelle v. Smith*, 451 U.S. 454, 463 (1981).

Respondent maintains that the facts of record support the Vermont Supreme Court's findings that respondent's statements were made involuntarily in violation of the Fifth Amendment. In any event, this Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 286 U.S. 220, 227 (1925).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: February 4, 1987